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No. 88-1751

In The

Supreme Court of the United States

October Term, 1988

NORTHWEST FOREST RESOURCE COUNCIL,

Petitioner,

v.

PORTLAND AUDUBON SOCIETY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Mountain States Legal Foundation (MSLF or Foundation) hereby respectfully moves to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

The interest of the Foundation in this case arises from the fact that many MSLF members hold economic interests of the type that were denied intervention of right in the present case. Intervention in such cases is one of the

principle ways in which the Foundation serves its public interest goal of defending the free enterprise system in the western states. The Foundation's interests are further detailed in the attached brief.

The Foundation's intervention to protect economic interests in numerous environmental cases gives it special insight into the importance of the decision below. This insight should be considered by this honorable Court in making the decision to grant the petitioned writ.

Respectfully submitted,

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE..... 3

REASONS FOR GRANTING THE WRIT 3

I. THE NINTH CIRCUIT DECISION STRIPS WESTERN PUBLIC LAND USERS OF THE RIGHT TO DEFEND THEIR LIVELIHOODS AGAINST SUITS BROUGHT UNDER NEPA .. 3

II. THE NINTH CIRCUIT DECISION GIVES FEDERAL LAND MANAGERS THE OPPORTUNITY TO UNILATERALLY DISPOSE OF WESTERNERS' LIVELIHOODS..... 6

III. THE NINTH CIRCUIT DECISION DENIES PARTICIPATION TO THOSE WHO KNOW THE MOST ABOUT THE PUBLIC LANDS 8

CONCLUSION 8

TABLE OF AUTHORITIES

Pages

CASES

Animal Defence Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988) 2

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) 2, 7

National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987) 2, 4, 5

Natural Resources Defense Council v. Hodel, Civil No. 5-86-0548 EJG (E.D. Cal.) 6

Portland Audubon Society v. Hodel, 866 F.2d 302 (9th Cir. 1989) 3

Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985) 2

Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985) 2

STATUTE

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4331-34 (1982) 2

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BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

The Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief *amicus curiae* in support of the Northwest Forest Resource Council, the Petitioner for certiorari.

INTEREST OF AMICUS CURIAE

The Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private

property rights, and the free enterprise system. The Foundation is particularly active in western public land and natural resource issues.

Foundation members include businesses and individuals who earn their living on the public lands or who otherwise depend for their economic well-being upon those who do. The timber, minerals, forage, water, and other resources used by MSLF members are managed under the land management and environmental statutes of the United States. The allocation of these resources, upon which the livelihoods of MSLF members depend, are often the subject of litigation under environmental statutes including the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4331-34 (1982).

In the past, when environmental suits have threatened the livelihoods of MSLF members, they have intervened in court proceedings to protect those economic interests. In many proceedings, MSLF has represented its members, in other proceedings MSLF members have defended their livelihoods through private counsel.

MSLF has intervened in cases brought under environmental statutes, including NEPA, in numerous civil actions, including but not limited to, the following cases: *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987), *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied*, ___U.S.___ (1989), *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985), *Natural Resources Defense Council v. Hodel*, Civil No. 5-86-0548 EJG (E.D. Cal.), *Animal Defense Council v. Hodel*, 840 F.2d 1432 (9th Cir. 1988), and *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985).

The Ninth Circuit's denial in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), of the right to intervene to protect economic interests in litigation brought under NEPA will have a profound effect on numerous kinds of private activity. While the Foundation is interested in many of these areas, this *amicus* brief will primarily address the example of environmental litigation affecting the public lands. It is in this area that the Foundation has demonstrated its preeminence.

STATEMENT OF THE CASE

Amicus Curiae adopts Petitioner's statement of the case.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION STRIPS WESTERN PUBLIC LAND USERS OF THE RIGHT TO DEFEND THEIR LIVELIHOODS AGAINST SUITS BROUGHT UNDER NEPA

The present case arises out of a federal agency action affecting the public lands of the United States. The Court should be aware that the public lands are mostly productive lands that are the basis of the livelihoods of millions of Westerners. Ranchers have built family ranches on the basis of the availability of federal forage. Loggers have relied on federal timber for generations. Energy companies and individual wildcatters have spent millions of dollars and decades exploring the public lands of the West to develop the various energy reserves with which

those lands abound, including, but not limited to oil, gas, coal, geothermal, oil shale, and tar sands. Mineral companies and private individuals have spent hundreds of millions of dollars and over one hundred years exploring for and developing vitally needed – for defense for example – mineral resources, including but not limited to, silver, lead, zinc, gold, cobalt, copper, beryllium, and rare earths. Finally, communities have been built around these activities, communities which derive their water from rivers and streams which flow across the public lands.

In the eastern states, the federal government sold the public lands to private individuals. Those lands became the economic base of that part of the country that lies east of the one hundredth meridian. In the West, the situation was different. The lands were retained by the federal government, and federal law provided for the economic utilization of the public lands. Westerners built their economy around those public land laws. In light of that history, it would be unfair now to disallow Westerners from intervening to represent the same kinds of economic interests that can be protected in the East.

When environmental issues came to the forefront in the sixties and seventies, the economic activities on the public lands were subjected to federal laws requiring consideration of environmental concerns. Those environmental laws, including NEPA, became the bases for injunctions which stopped or hindered the resource utilization and the economic well-being of Westerners. *See, e.g., National Wildlife Federation v. Burford,* 835 F.2d 305 (D.C. Cir. 1987).

The present case presents a classic example of the extreme unfairness of the Ninth Circuit's rule. The spotted owl controversy and the associated litigation stand to cost Pacific Northwest timber communities tens of thousands of jobs directly and hundreds of thousands of jobs indirectly. Numerous sawmills have closed already. The men and women who depend on the public lands will be devastated.

In this case, public land users do not ask that the Court protect their economic use, all they ask is that they be allowed to go to court and argue for proper application of environmental statutes, statutes that if improperly applied will cause them grievous harm.

It is not enough to say that the federal government represents land users. This is simply not the case. Federal land managers have a myriad of conflicting duties, including duties to develop resources and to protect the environment. Only the public land users can truly represent their own interests.

Separate representation of public land users is not an insubstantial matter. An example is the ongoing case of *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (ruling on appeal of preliminary injunction). In that case, the Foundation, representing public land users, challenged the National Wildlife Federation's standing to sue under NEPA to set aside an entire general purpose government program. Initially, the federal government failed to make this argument. The Foundation advanced the argument and eventually prevailed at the district court.[1]

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[1] The district court decision is currently on appeal.

Similarly, the Foundation's arguments influenced the course of grazing fee litigation in *Natural Resources Defense Council v. Hodel,* Civil No. 5-86-0548 EJG (E.D. Cal.). In that case, ranchers across the country could have been forced to pay significantly more for grazing rights on the public lands. Many stood to lose the economic viability of their ranches because of the increased fees that would be paid to the government. Only the intervention of ranchers represented by MSLF permitted the ranching interests directly affected by the litigation to be adequately represented.

Those with the most at stake in environmental litigation are those whose livelihoods depend on the resources affected by environmental lawsuits. To hold, as the Ninth Circuit did, that the environmental laws only protect the "environment" and do not give other resource users any right to defend their livelihoods is unfair. "Environmental" laws are really "resource" laws, and to bar the right of resource users to litigate under them is an artificial and politically based distinction that has no place in the courts.

II. THE NINTH CIRCUIT DECISION GIVES FEDERAL LAND MANAGERS THE OPPORTUNITY TO UNILATERALLY DISPOSE OF WESTERNERS' LIVELIHOODS

In the past few years, the federal government has been willing to defend private utilization of resources on the public lands. However, this may not always be the case. The decision of whether or not to prosecute a lawsuit is within the discretion of the government. If the government chooses to abandon the interests of public

land users, then land users will be powerless to do anything about it. A right of intervention is essential to prevent, or at least impede sweetheart lawsuits from threatening public land user rights.

An example of the potentially devastating effect of the government abandoning its interest came in *National Wildlife Federation v. Burford*, noted above. Initially, the government's attorneys admitted alleged environmental procedural errors, errors that did not exist. The result was imposition of a preliminary injunction blocking land use. Had the government not reversed this position and asserted – correctly – that no errors had been made, and had MSLF not been allowed to intervene, thousands of individual property rights in the public lands affecting thousands, if not millions, of Westerners, could have been declared void.

It is not hard to imagine what would happen in an administration that drew large numbers of its officials from the environmental organizations that are currently litigating public land issues. Sweetheart lawsuits could devastate the western economy. Those who stood to lose their jobs and ability to earn a living could only look on helplessly as federal officials declined to defend themselves against lawsuits detrimental to the livelihoods of Westerners. While that situation may occasionally happen even if intervention is allowed, it is far less likely where public land users are able to intervene on behalf of their economic interests and be present in court to argue the merits of the case.

III. THE NINTH CIRCUIT DECISION DENIES PARTICIPATION TO THOSE WHO KNOW THE MOST ABOUT THE PUBLIC LANDS

The substance of NEPA litigation relates to arguments over the impact on natural resources. In many instances, those resources are under the stewardship of public land users. For example, in the case of grazing and forage, no one knows more about the condition of the range than ranchers. They live upon the land and visit the range most often. They know how much animals eat. They must plan so that there is forage in the future.

The Ninth Circuit's rule would allow urban based environmental groups to argue with the federal government about the status of a rancher's forage. The very people who are the closest to the land could be precluded from arguing in court.

CONCLUSION

The Court should recognize that improper application of environmental statutes has the potential to seriously harm the livelihoods of millions of Westerners. Environmental statutes are really resource statutes, and resource users must be allowed to participate in litigation under those statutes. For that reason and the reasons stated above, the intervention of the Northwest Forest Resource Council to argue questions of application of

NEPA should have been granted. Accordingly, this honorable Court should grant the writ of certiorari and reverse the ruling below.

Respectfully submitted,

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